No. 988

No. 1207

No. 15073

Office - Supreme Court, U.S.
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United States
Court of Appeals
for the Ninth Circuit

DESSER, RAU & HOFFMAN, and JACK L. RAU, individually, Appellants,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of Stockholders Publishing Company, Inc., a bankrupt, Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

FILED
JUN -7 1956
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —5-24-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

Attorneys for Appellant:

DESSER & HOFFMAN
DAVID R. NISALL
JACK L. RAU

444 North Camden Drive
Beverly Hills, California

Attorneys for Appellee:

ROBERT H. SHUTAN

433 S. Beverly Drive
Beverly Hills, California

CRAIG, WELLER & LAUGHARN

111 West 7th Street
Los Angeles 14, California. [1*]

In the District Court of the United States, Southern District of California, Central Division

No. 64381—WB

In the Matter of STOCKHOLDERS PUBLISHING COMPANY, INC, a corporation, alleged bankrupt.

PETITION TO ALLOW PAYMENT OF EXPENSES

To the Honorable David B. Head, Referee in Bankruptcy:

The petition of Desser, Rau & Hoffman respectfully represents:

I.

That prior to the filing of the involuntary petition in bankruptcy herein, your petitioners acted as attorneys for Stockholders Publishing Company, Inc., a corporation, the above named alleged bankrupt. That during the period of December 20, 1954 to December 31, 1954, your petitioners acting as attorneys for said alleged bankrupt opened a bank account, designated as "Jack L. Rau, Special Account" at Union Bank & Trust Co., in which was deposited certain funds belonging to said corporation, and out of which certain disbursements were made. That an accounting of said receipts and disbursements was forwarded to George T. Goggin, Esq., Receiver herein, on January 5, 1955, at which time the said account contained the sum of $16,-163.15. [2]

II.

In connection with your petitioners' representation of said alleged bankrupt since December 26, 1953, your petitioners have expended substantial sums of money for transportation to the East coast in connection with the affairs of the corporation, long distance telephone charges, traveling and hotel expenses. That said expenses amounted to $3217.68 as per Exhibit "A" attached hereto and made a part hereof.

III.

That your petitioners have remitted to the said Receiver the sum of $12,945.47 and have retained the sum of $3217.68 pending a determination by this Court as to whether or not your petitioners may offset said sums deposited with them by the alleged bankrupt with their out of pocket expenses.

IV.

That during the time your petitioners represented the alleged bankrupt, your petitioners never billed the corporation for fees, nor received any monies on account of fees from the corporation. That the said sum of $3217.68 retained by your petitioners represents no charge for fees.

Wherefore, your petitioners pray that an order be made and entered herein authorizing your petitioners to reimburse themselves from the "Jack L. Rau, Special Account" in the sum of $3217.68 for transportation, long distance telephone charges,

hotels, travel, etc. as hereinabove set forth. [3]

DESSER, RAU & HOFFMAN
/s/ By JACK L. RAU

EXHIBIT "A"

Long Distance Telephone Calls made from December 1953 to December 1954 on Crestview 5-4548 and Bradshaw 2-6531.....	$ 326.33
Transportation (2 trips to New York, 1 trip to San Francisco and 2 trips to San Diego, and 1 trip to Chicago).....	913.25
Traveling Expenses: Hotel, Meals, Long Distance Phone Calls, etc.	
In New York—3/31/54-4/18/54	
In Chicago—4/19/54-4/22/54	
In New York—4/26/54-4/30/54	
In San Diego—5/17/54	
In San Diego—5/27/54 and 5/28/54	
In San Francisco—6/8/54.....	1,978.10
Total	$ 3,217.68

Duly Verified. [5]

[Endorsed]: Filed January 21, 1955.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the petition of Desser, Rau & Hoffman for an Order to Show Cause, it is

Ordered, that George T. Goggin, Esq., Receiver

herein, show cause before the undersigned Referee in Bankruptcy, on the 24th day of February, 1955, at 10 o'clock A.M. in his courtroom, Third Floor Federal Building, Los Angeles, California, if any he has, why an order should not be made and entered herein granting the petition of Desser, Rau & Hoffman for authority to reimburse themselves in the sum of $3217.68 from the "Jack L. Rau Special Account" for transportation, long distance traveling charges, hotels, travel, etc. as per Exhibit "A" Attached to said Petition and made a part hereof by reference; and it is further

Ordered, that service of a copy of this Order to Show Cause and a copy of the Petition upon which it is based may be made by United States mail, postage prepaid, upon said respondent, if said service is made at least five days before the hearing thereon.

Dated: January 21, 1955.

/s/ DAVID B. HEAD
Referee in Bankruptcy. [6]

[Endorsed]: Filed January 21, 1955.

[Title of District Court and Cause.]

MEMORANDUM BY REFEREE, DESSER, RAU & HOFFMAN V. TRUSTEE

The law firm of Desser, Rau and Hoffman have petitioned for leave to reimburse themselves in the amount of $3217.68 from a fund under their con-

trol, held in a bank account known as the "Jack L. Rau, Special Account."

The facts set out in the petition are admitted to be true. I quote from Paragraphs I and III.

"That prior to the filing of the involuntary petition in bankruptcy herein, your petitioners acted as attorneys for Stockholders Publishing Company, Inc., a corporation, the above named alleged bankrupt. That during the period of December 20, 1954 to December 31, 1954, your petitioners acting as attorneys for said alleged bankrupt opened a bank account, designated as 'Jack L. Rau, Special Account' at Union Bank & Trust Co., in which was deposited certain funds [52] belonging to said corporation, and out of which certain disbursements were made. That an accounting of said receipts and disbursements was forwarded to George T. Goggin, Esq., Receiver herein, on January 5, 1955, at which time the said account contained the sum of $16,163.15.

"That your petitioners have remitted to the said Receiver the sum of $12,945.47 and have retained the sum of $3217.68 pending a determination by this Court as to whether or not your petitioners may offset said sums deposited with them by the alleged bankrupt with their out of pocket expenses."

Exhibit "A" shows that these expenditures were for phone calls and travel expense incurred from December 1953 to December 1954.

It is clear that Rau held the moneys in the special account as trustee or agent of the bankrupt

corporation and did not acquire any other interest in the fund. Petitioners have argued that they are entitled to set off their account against the funds in Rau's special account under the provisions of section 68a, Bankruptcy Act, which reads as follows:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

It is clear to me that no mutuality of debts or credits are involved in this matter. Mr. Rau does not hold this fund as his own, but as trustee or agent of the bankrupt. He cannot and does not assert that this fund represents a [53] debt of his to the bankrupt. In fact the fund held by Mr. Rau is the property of the bankrupt.

Before the moneys were turned over to Mr. Rau, his law partner, Mr. Desser, who was a director as well as counsel for the bankrupt corporation, had full knowledge of the insolvency of the bankrupt corporation. At a directors' meeting on December 18, 1954 in which Mr. Desser participated, the directors authorized the president of the bankrupt corporation to institute bankruptcy proceedings. If a transfer of this fund were permitted it would date from December 20, 1954 or later. This would create a voidable preference under the provisions of section 60a of the Bankruptcy Act.

Petition is denied and the petitioners and Jack L. Rau, as an individual, are directed to pay over

to the trustee the amount held in the "Jack L. Rau, Special Account."

If findings and conclusions are not waived, counsel for trustee shall prepare, serve and present the same to the court together with an appropriate order.

Dated this 25th day of July, 1955.

/s/ DAVID B. HEAD
Referee in Bankruptcy. [54]

[Endorsed]: Filed July 25, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The verified petition of Desser, Rau & Hoffman seeking an order of this court allowing payment of expenses having come on for hearing before this court on the 10th day of March, 1955, petitioner being represented by Jack Rau, Esq., and the Trustee being represented by his counsel Robert H. Shutan and Craig, Weller & Laugharn by Robert H. Shutan, and the court having heard statements on behalf of the parties and arguments of counsel, and counsel for both sides having submitted memorandums in support of their respective positions, and the matter having been taken by this court under submission; now upon all of the proceedings had before it and upon all of the statements, plead-

ings and documents this court hereby makes the following Findings of Fact and Conclusions of Law and its Order thereupon:

Findings of Fact

I.

That prior to the filing of the involuntary petition in bankruptcy herein on December 31, 1954, petitioners Desser, [55] Rau & Hoffman, Attorneys at Law, acted as attorneys for Stockholders Publishing Company, Inc., the bankrupt corporation. That Arthur Desser, one of the partners in said law firm of Desser, Rau & Hoffman, was an officer and director of the bankrupt corporation, as well as counsel, during the entire month of December 1954, as well as for a number of months prior thereto.

II.

That at a meeting of the Board of Directors of the bankrupt corporation on December 18, 1954, at which meeting Arthur Desser was present and participated, the directors authorized the President of the bankrupt corporation to institute bankruptcy proceedings.

III.

That after ceasing its operation on December 18, 1954, the bankrupt corporation needed access to a new bank account for the protection of its incoming funds and for the making of certain essential disbursements from said funds. That for said purpose, on December 20, 1954, the petitioners Desser, Rau & Hoffman, acting as attorneys for the bank-

rupt corporation, opened at the Union Bank & Trust Company of Los Angeles, a bank account designated as "Jack L. Rau, Special Account". That in said account there was deposited certain funds belonging to the corporation, and out of said account certain disbursements were made.

IV.

That on January 5, 1955, petitioners herein rendered an accounting of said receipts and disbursements to George T. Goggin, the Receiver, at which time the said account contained the sum of $16,163.15. That petitioners remitted to the Receiver the sum of $12,945.47 and have retained and still hold the sum of $3,217.68.

V.

That petitioners expended from their own [56] funds on behalf of the bankrupt corporation between December 1953 and December 1954, the sum of $3,217.68 for long distance phone calls and travel expense on behalf of the bankrupt corporation. That all of said expenditures and expenses were incurred prior to December 18, 1954.

VI.

That on December 31, 1954, the date of the commencement of these bankruptcy proceedings, on January 5, 1955, and at all times pertinent hereto, the subject sum of $3,217.68 has remained in said "Jack L. Rau, Special Account" at the Union Bank & Trust Company, Los Angeles.

VII.

That Jack L. Rau held the monies in said special account as Trustee or agent of the bankrupt corporation and said Jack L. Rau did not acquire any other interest in said fund.

VIII.

That the monies held by Jack L. Rau in the "Jack L. Rau, Special Account" at the Union Bank & Trust Company of Los Angeles constitutes property of the bankrupt corporation.

From the above Findings of Fact this court now makes the following:

Conclusions of Law

I.

Jack L. Rau held the subject monies in said special account as Trustee or agent of the bankrupt corporation and did not acquire any other interest in said fund.

II.

There is no mutuality of debts or credits between the funds held by petitioners and the obligation of the bankrupt corporation for the funds advanced by petitioners. The funds held [57] by Jack L. Rau on a special account constitute property of the bankrupt corporation.

Upon the foregoing Finding of Fact and Conclusions of Law this court now makes its Order.

Order

Upon all of the proceedings had before me in this matter and upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

Ordered that Desser, Rau & Hoffman and Jack L. Rau individually pay over to George T. Goggin, Trustee herein, the sum of $3,217.68, being the amount held in the "Jack L. Rau, Special Account."

Dated: August 17, 1955.

/s/ DAVID B. HEAD
Referee in Bankruptcy. [58]

Affidavit of Service by Mail Attached. [59]

[Endorsed]: Filed August 17, 1955.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable David B. Head, Referee in Bankruptcy:

Come now your petitioners, Desser, Rau & Hoffman, and petition for a review of the order made and entered on August 17, 1955, and titled "Findings of Fact, Conclusions of Law and Order", and respectfully shows:

I.

Petitioners are, or were at the time of the events in controversy, partners in the law firm of Desser,

Rau & Hoffman with offices at 444 North Camden Drive, Beverly Hills, California.

II.

On January 21, 1955, petitioners filed herein their petition entitled "Petition to Allow Payment of Expenses", in which petitioners prayed that an order be entered authorizing them to reimburse themselves from an account known as the "Jack L. Rau Special Account" which had been created by petitioners in which certain funds of the corporation were deposited and out of which [60] certain disbursements were made. In said petition it was alleged that in connection with petitioners' representation of the bankrupt as its counsel prior to bankruptcy, and since December 26, 1953, petitioners expended the sum of $3,217.68 for which petitioners were not reimbursed, and which amount said corporation owed petitioners at the time of the filing of the petition in bankruptcy. It was further alleged in said petition that an accounting of deposits in and disbursements from said special account was made to the Receiver herein on January 5, 1955, at which time said account contained the sum of $16,163.15 and that petitioners remitted to said Receiver the sum of $12,945.47 and retained the sum of $3,217.68, the amount of their out of pocket expense, pending a determination as to whether or not they might offset said sum so retained against said out of pocket expense: all of which will more fully appear from the Petition to Allow the Payment of Expenses.

III.

Said petition came on for hearing before Referee David B. Head on the 10th day of March, 1955, at which time unsworn statements were made on behalf of the parties and said Referee heard the arguments of counsel for the respective parties. Counsel for petitioners and counsel for the Trustee in bankruptcy herein submitted memoranda in support of their respective positions and the matter was thus taken by the Court under such submission. No answer of the Receiver or Trustee in bankruptcy herein was filed and there was no sworn testimony or evidence on behalf of either side.

IV.

On July 25, 1955, said Referee filed his memorandum in which he concluded that petitioners' petition should be denied and directed that, if findings and conclusions were not waived, counsel for the Trustee should prepare, serve and present the same to the [61] Court together with an appropriate order. Thereafter on August 17, 1955, said Referee filed his findings of fact, conclusions of law and order denying the prayer of your petitioners' petition.

V.

Petitioners respectfully contend that the Referee erred in the following respects:

1. In denying the prayer of petitioners' petition.

2. In making findings of fact numbered VII and VIII on the basis of which the prayer of the petition was denied. Said findings VII and VIII do

not constitute ground or reason for the conclusion of law that petitioners possess no right of setoff or counterclaim as prayed in their petition.

3. In concluding as a matter of law that because said special account was created by petitioners and was held by Jack L. Rau as trustee or agent of the bankrupt, and did not acquire any other interest in said fund, petitioners counter-demand for an admitted indebtedness of the bankrupt to them is not allowable.

4. In concluding as a matter of law that there is no mutuality of debts or credits between the fund held by petitioners and the obligation of the bankrupt on its indebtedness to petitioners.

5. In holding that petitioners right of setoff or counter-claim is not allowable under Section 68 of the Bankruptcy Act.

6. In failing to hold that under Rule 13 (b) of the Federal Rules of Civil Procedure (which provides that "a pleading may state as a counter-claim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim"), petitioners' counter demand is assertable in bankruptcy, (General Order No. 37, as amended, providing that in proceedings under the Bank- [62] ruptcy Act the Federal Rules of Civil Procedure shall be followed when not inconsistent with the Act or other general orders), and in failing to hold that the application of Rule 13 (b) is not inconsistent with any provisions of the Bankruptcy Act or with any other general order in bankruptcy.

7. In holding that there is no mutuality of debts or credits between the funds held by petitioners and the obligation of the bankrupt corporation for funds advanced by petitioners.

8. In holding that because the said special account constituted property of the bankrupt corporation, petitioners right of setoff or counterclaim cannot lawfully be maintained.

9. In failing to hold that "mutual credit" is not confined to ordinary pecuniary demands but extends to all cases where the creditor has in his hands goods, money or choses in action belonging to the debtor which cannot be "got at" without suit at law or complaint in equity.

10. In failing to hold that the right of setoff or counterclaim in bankruptcy does not depend upon the variety or nature of the contract debt or the character of or position occupied by the parties.

11. In holding (in his memorandum dated July 25, 1955) that if a transfer to petitioners of the amount of their out of pocket expense, out of said fund were permitted, it would date from December 20, 1954 or later and would thus create a voidable preference.

12. In failing to hold that both before and after bankruptcy, the amount of the debt due petitioners could be setoff or counterclaimed against the amount due from petitioners to the bankrupt out of said special account, and that the taking or authorization to setoff or counterclaim as against said account of the amount so due to petitioners would not constitute an avoidable preference re-

gardless of when the setoff occurred or when [63] bankruptcy intervened.

13. In failing to hold that no question of avoidable preference is present in the instant proceedings.

Wherefore petitioners, feeling aggrieved because of the Order, Findings of Fact and Conclusions of Law of said Referee, pray that the same may be reviewed as provided by Section 39c of the Bankruptcy Act as amended; that said Order be reversed and remanded with directions to allow the prayer of petitioners' petition or reversed with an order by the Court, on review, allowing said prayer of said petition.

That the Honorable David B. Head, Referee in Bankruptcy, prepare his certificate of review and attach thereto the following:

1. The order of adjudication.
2. Petition of petitioners to allow payment of expenses.
3. Order to show cause of said Referee in said bankruptcy upon George T. Goggin, Esq., the Receiver herein, dated January 21, 1955.
4. The transcript, if any, of the reporter on the hearing on petitioners' petition on March 10, 1955.
5. Petitioners' brief in support of their petition.
6. Trustee's memorandum in opposition to petition to allow payment of expenses.
7. Reply of petitioners to Trustee's memorandum.
8. Memorandum by Referee dated July 25, 1955.

9. Findings of fact, conclusions of law and order of said Referee dated August 17, 1955.

10. Petition for review.

Respectfully submitted,

DESSER, RAU & HOFFMAN
/s/ By DAVID M. HOFFMAN
Petitioners. [64]

Duly Verified.

Affidavit of Service by Mail Attached. [65]

[Endorsed]: Filed August 26, 1955.

In the United States District Court, Southern District of California, Central Division

In Bankruptcy—No. 64381-WB

In the Matter of STOCKHOLDERS PUBLISHING COMPANY, INC., Bankrupt.

ORDER AFFIRMING ORDER OF REFEREE

The above entitled matter having come on regularly for hearing before the above entitled court on the 28th day of November, 1955, at 9:45 o'clock A.M., upon the Petition of Desser, Rau & Hoffman, for review of the Referee's Order of August 17, 1955, directing that Desser, Rau & Hoffman and Jack L. Rau pay over to George T. Goggin, Trustee, the sum of Three Thousand Two Hundred Seventeen and sixty-eight cents ($3217.68); and Desser and Hoffman by David Nisall appearing for

and on behalf of said Desser, Rau & Hoffman, Petitioners, and Robert H. Shutan and Craig, Weller & Laugharn by Robert H. Shutan appearing for and on behalf of said George T. Goggin, Trustee, and by agreement of all parties the matter having been submitted to the court upon the written briefs and points and authorities, and the court having duly considered the same, now it is hereby

Ordered that the Order of the Referee dated August 17, 1955, ordering that Desser, Rau & Hoffman and Jack L. Rau individually pay over to George T. Goggin, Trustee, the sum of $3217.68 be and [111] it hereby is approved and affirmed. It is further

Ordered that the Findings of Fact and Conclusions of Law of the Referee in said matter, also under date of August 17, 1955, are hereby approved and adopted as part of this Order.

Dated: January 11, 1956.

/s/ W. M. BYRNE
Judge of the U. S. District Court.

Approved as to form pursuant to Rule 7 (a), as amended.

DESSER & HOFFMAN and DAVID NISALL

/s/ By DAVID R. NISALL
Attorneys for Petitioners. [112]

[Endorsed]: Docketed, Entered and Filed January 11, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Desser, Rau & Hoffman, petitioners above named, and Jack L. Rau, individually, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order of the District Court of the United States, Southern District of California, Central Division, entered on January 11, 1956, affirming the order of Referee in Bankruptcy David B. Head, dated August 17, 1955, ordering that Desser, Rau & Hoffman and Jack L. Rau, individually, pay over to George T. Goggin, Trustee in bankruptcy of Stockholders Publishing Company, Inc., a corporation, in the sum of $3,217.68, and approving and adopting as part of said order on review the Findings of Fact and Conclusions of Law of said Referee in said matter, also dated August 17, 1955.

Dated January 31, 1956.

DESSER, RAU & HOFFMAN

/s/ By DAVID R. NISALL

Attorneys for Desser, Rau & Hoffman and Jack L. Rau individually. [113]

Receipt of Copy Attached.

[Endorsed]: Filed January 31, 1956.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Know all men by these presents, that Fidelity and Deposit Company of Maryland, a corporation, organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto George P. Goggin, Trustee, in the above case, in the penal sum of Two Hundred Fifty and no/100 ($250.00), to be paid to said George P. Goggin, Trustee, his successors, assigns or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

The condition of the above obligation is such, That Whereas the firm of Desser, Rau, and Hoffman, and Jack L. Rau, individually, have appealed or are about to appeal to the United States Court of Appeals for the Ninth Court from an Order heretofore entered in this proceeding on January 11, 1956, which Order affirmed an Order by Referee Head, dated August 17, 1955, requiring Desser, Rau, and Hoffman, and Jack L. Rau, individually, to pay over to George P. Goggin, Trustee, the sum of Three Thousand Two Hundred and Seventeen and 68/100 ($3,217.68) and which approved and adopted the findings of fact and conclusions of law of said Referee Head.

Now, Therefore, if the above named appellant

shall prosecute said appeal to effect and answer all costs which may be adjudged against them if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It is Hereby agreed by the Surety that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them [114] or either of them, in accordance with their obligation and award execution thereon.

Signed, Sealed and Dated this 30 day of January, 1956.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND

/s/ By ROBERT HECHT
Attorney-in-fact.

Approved this 31st day of January, 1956.

JOHN A. CHILDRESS
Clerk, U. S. District Court, Southern District of California.

/s/ By REX LAWSON

Notary Public's Certificate Attached. [115]

[Endorsed]: Filed January 31, 1956.

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

David R. Nisall, being first duly sworn, deposes and says:

That he has supervision of the appeal in the above entitled cause and together with another associate in his office had prepared a statement of the case, for purposes of the appeal, pursuant to Rule 76 of the Rules of Civil Procedure, but thereafter it was determined by counsel for petitioners-appellants and counsel for the Trustee in bankruptcy, respondent-appellee, that instead of presenting an agreed statement and instead of serving designations of the record, that the parties by written stipulation designate the parts of the record to be included in the record on appeal; that affiant has been practically constantly engaged in set matters and will be so engaged for some days to come; affiant further states that it is necessary [116] that an additional ten (10) days be granted within which to do such work as is necessary to docket the record on appeal. Affiant further respectfully requests the Court to grant an extension of ten (10) days to and including March 22, 1956.

/s/ DAVID R. NISALL
Affiant

Subscribed and sworn to before me this 8th day of March, 1956.

[Seal] /s/ PATRICIA BRADY
Notary Public in and for said County and State. [117]

[Endorsed]: Filed March 9, 1956.

[Title of District Court and Cause.]

ORDER

It is Hereby ordered that the time to docket the record in the above entitled case on appeal to the United States Court of Appeals for the Ninth Circuit be and the same is hereby extended ten (10) days, to and including March 22, 1956.

Dated: March 9, 1956.

/s/ W. M. BYRNE
Judge

There is no objection to the entry of the foregoing order. Robert H. Shutan and Craig, Weller & Laugharn. By Robert H. Shutan, Attorneys for respondent-appellee. [118]

[Endorsed]: Filed March 9, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED ON BY APPELLANTS

1. The District Court erred in holding that appellants' claim for actual and admitted out-of-pocket expenses incurred on behalf of the bankrupt, prior to bankruptcy, is not the proper subject of a setoff or counterclaim against the claim of the bankrupt and its Trustee to the fund held by appellants in the "Jack L. Rau, Special Account".

2. The District Court erred in concluding as a matter of law that because the special account was created by petitioners and was held by Jack L. Rau as Trustee or agent of the bankrupt, and did not themselves own or acquire any other interest in said fund, appellants' counterdemand for an admitted indebtedness of the bankrupt to them is not allowable.

3. The District Court erred in holding that Jack L. Rau, the partner designated by appellants to hold the subject moneys in a special account as Trustee or agent of the bankrupt, did not acquire any other interest in said fund and that [119] therefore there is no mutuality of debts or credits as between the respective claims.

4. The District Court erred in holding that petitioners' right of setoff or counterclaim is not allowable under Section 68 (a) of the Bankruptcy Act.

5. Section 68 (a) of the Bankruptcy Act re-

quires that the prayer of the petition for an order allowing petitioners to setoff or counterclaim their undisputed demand against the bankrupt be granted since the Courts have given a broad construction to the words "mutual debts or mutual credits", not confining them to the ordinary "debtor and creditor" situation but extending their meaning to include money, property and even choses in action of the bankrupt held by the creditor.

6. The District Court erred in failing to hold that under Rule 13(b) of the Federal Rules of Civil Procedure (said rules being made applicable to bankruptcy by General Order in Bankruptcy No. 37 as amended) a pleading may state as a counterclaim any claim against an opposing party even though not arising out of the transaction or occurrence which is the subject matter of the opposing parties' claim, and in failing to hold that under said rule appellants' setoff or counterclaim for out-of-pocket expenses is assertable.

7. The District Court erred in failing to hold that a Bankruptcy Court is a court of equity applying equitable principles in the accomplishment of substantial justice and that under such principles appellants' setoff or counterclaim should be allowed.

Dated: March 8, 1956.

DESSER, RAU & HOFFMAN

/s/ By DAVID R. NISALL

Attorneys for petitioners - appellants. [120]

[Endorsed]: Filed March 9, 1956.

[Title of District Court and Cause.]

STIPULATION AS TO RECORD

It is Hereby stipulated and agreed by and between Desser, Rau & Hoffman (petitioners-appellants) and George T. Goggin, Esq., Trustee in bankruptcy of Stockholders Publishing Company, Inc., a bankrupt, (respondent-appellee) by their respective counsel that the following are designated as parts of the record and proceedings before the United States District Court for the Southern District of California, Central Division, to be included in the record on appeal to the United States Court of Appeals for the Ninth Circuit:

1. Petition of Desser, Rau & Hoffman to allow payment of expenses, filed January 21, 1955, together with Exhibit A to the petition, filed before Referee David B. Head.

2. Order of Referee David B. Head upon George T. Goggin as Receiver of the bankrupt to show cause why an order should not be entered pursuant to the prayer of said [121] petition dated and filed January 21, 1955.

3. Brief in support of petition to allow payment of expenses filed with said referee.

4. Trustee's memorandum in opposition to petition to allow payment of expenses, filed with said referee.

5. Reply to Trustee's memorandum in re petition to allow payment of expenses.

6. Memorandum of Referee David B. Head, filed

July 25, 1955, denying the petition to allow payment of expenses and ordering petitioners and Jack L. Rau, individually, to pay over to the Trustee in bankruptcy the amount held in the "Jack L. Rau, Special Account".

7. Findings of fact, conclusions of law and order of Referee David B. Head, entered and filed on August 17, 1955, ordering Desser, Rau & Hoffman and Jack L. Rau, individually, to pay over to George T. Goggin, Trustee, the sum of $3,217.68, being the amount held in the "Jack L. Rau, Special Account".

8. Petition for review of the order, findings and conclusions of Referee David B. Head by the United States District Court, filed August 26, 1955.

9. Points, authorities and brief on behalf of petitioners on petition for review by the United States District Court.

10. Trustee's memorandum of points and authorities in opposition to petition for review.

11. Reply of petitioners to Trustee's memorandum in opposition to petition for review.

12. Order of the United States District Court (Honorable Wm. M. Byrne) affirming the order of Referee David B. Head, dated August 17, 1955, and approving and adopting the findings of fact and conclusions of law [122] of said Referee.

13. Notice of appeal by petitioners-appellants, dated, served and filed January 31, 1956.

14. Bond or undertaking for costs on appeal in the sum of $250.00, executed by Fidelity and Deposit Company of Maryland.

Pursuant to the foregoing stipulation, the parties hereto respectfully request that the Clerk of the District Court of the United States for the Southern District of California, Central Division, under his hand and seal of the Court transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit the matters so designated by the parties by such stipulation.

Dated: March 8, 1956.

DESSER, RAU & HOFFMAN
/s/ By DAVID R. NISALL
Attorneys for petitioners-appellants

ROBERT H. SHUTAN and CRAIG, WELLER & LAUGHARN
/s/ By ROBERT H. SHUTAN
Attorneys for respondent-appellee

[Endorsed]: Filed March 9, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 123, inclusive, contain the original

Petition to Allow Payment of Expenses;

Order to Show Cause;

Trustee's Memorandum in Opposition to Petition to Allow Payment of Expenses;

Reply to Trustee's Memorandum in re Petition to Allow Payment of Expenses;

Brief in Support of Petition to Allow Payment of Expenses;

Memorandum by Referee;

Findings of Fact, Conclusions of Law & Order;

Petition for Review;

Petition for Review of Desser, Rau & Hoffman of Order of David B. Head, Referee;

Trustee's Memorandum of Points & Authorities in Opposition to Petition for Review;

Reply of Petitioners to Trustee's Memorandum in Opposition to Petition for Review;

Order Affirming Order of Referee;

Notice of Appeal;

Undertaking for Costs on Appeal;

Affidavit of David R. Nisall Stating that he has supervision of the appeal;

Order extending time to docket record on appeal;

Statement of Points to Be Relied on by Appellants;

Stipulation as to Record;

Which, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has been paid by appellants.

Witness my hand and the seal of said District Court, this 19th day of March, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

[Endorsed]: No. 15073. United States Court of Appeals for the Ninth Circuit. Desser, Rau & Hoffman, and Jack L. Rau, individually, Appellants, vs. George T. Goggin, Trustee in Bankruptcy of Stockholders Publishing Company, Inc., a bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 20, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15073

DESSER, RAU & HOFFMAN, Appellants,

vs.

GEORGE T. GOGGIN, TRUSTEE,

Appellee.

ADOPTION OF APPELLANTS' STATEMENT OF POINTS AND DESIGNATION

Now come Desser, Rau & Hoffman, appellants in the above entitled cause by Desser & Hoffman, their attorneys, and hereby adopt the statement of points to be relied upon by appellants on appeal as contained in the typewritten transcript of record certified by the Clerk of the District Court of the United States for the Southern District of California, Central Division, and filed herein; and also hereby adopt the designation of the record as per stipulation of the parties, also filed herein as part of said typewritten transcript of the record, except that appellants are advised and informed by the Clerk of the United States Court of Appeals for the Ninth Circuit that briefs of the parties filed below are not printed by him although the Court may, if it wills, refer to them by consulting said typewritten transcript. Therefore, the following items appearing at their respective index pages in said typewritten transcript so certified and filed by said Clerk of the

United States District Court are not designated for printing:

Brief in Support of Petition to Allow Payment of Expenses—Typewritten Transcript—Page 29

Trustee's Memorandum in Opposition to Petition to Allow Payment of Expenses—Typewritten Transcript—Page 7

Reply to Trustee's Memorandum in re Petition to Allow Payment of Expenses—Typewritten Transcript—Page 12

Points and Authorities and Brief on Behalf of Petitioners—Typewritten Transcript—Page 66

Trustee's Memorandum of Points and Authorities in Opposition to Petition for Review—Typewritten Transcript—Page 98

Reply of Petitioner to Trustee's Memorandum in Opposition to Petition for Review — Typewritten Transcript—Page 103

Dated: March 28, 1956.

DESSER & HOFFMAN
/s/ By DAVID R. NISALL,
Attorneys for Appellants

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 30, 1956. Paul P. O'Brien, Clerk.

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MAY 10 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 988

DESSER, RAU & HOFFMAN and JACK L. RAU, individually,

Petitioners,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of Stockholders Publishing Company, Inc., a bankrupt,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JACK L. RAU,
444 North Camden Drive,
Beverly Hills, California,
Attorney for Petitioners.

THEODORE E. REIN,
Chicago, Illinois,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. .....

DESSER, RAU & HOFFMAN and JACK L. RAU, individually,

Petitioners,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of Stockholders Publishing Company, Inc., a bankrupt,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Desser, Rau & Hoffman and Jack L. Rau, individually, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered January 8, 1957, petition for rehearing being denied March 6, 1957.

Opinion Below.

The opinion of the Court of Appeals is as yet unreported and for the convenience of the Court is appended to this petition. No opinion was rendered or filed by the

District Court of the United States for the Southern District of California, Central Division, affirming the order of the Referee in Bankruptcy, David P. Head, from which order and judgment of the District Court, the appeal to the Court of Appeals was taken. The District Court approved and adopted the findings of fact and conclusions of law of the Referee, which appear in the printed transcript of record filed in the Court of Appeals (nine copies of which have been heretofore filed herein) at pages 9 to 13 inclusive.

Jurisdiction.

The jurisdiction of this Court is invoked on the following grounds:

The date of the judgment sought to be reviewed, and its entry, is January 8, 1957, and the date of the order denying the petition for rehearing, filed February 25, 1957, pursuant to order of the Court of Appeals, is March 6, 1957.

Jurisdiction of this Court to review the judgment is believed to be conferred under United States Code, Title 28, Section 1254(1) and United States Code, Title 11, Section 47.

Question Presented for Review.

In a case where a party deposits funds with its attorneys, with which to create a special bank account in the name of one of their partners to be used for the purpose of drawing checks thereon, to pay obligations of the client; and where the attorneys, in handling the client's business, had theretofore made certain cash, out-of-pocket expenditures for the client; and before the funds had

been entirely expended the client became bankrupt and the purpose of the special account thus ended,—are the attorneys to be excluded from claiming a set-off for their out-of-pocket expenditures under Section 68(a) of the Bankruptcy Act which allows set-offs in all cases of mutual debts or mutual credits between the estate of the bankrupt and a creditor, on the ground that, as claimants to the set-off, they did not have an antecedent and independent right in or to the fund or a portion thereof by way of lien or otherwise?

Statutes, Orders and Rules Involved.

Section 68(a) of the Bankruptcy Act provides:

> "In all cases of mutual debts or mutual credits between the estate of the bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." (Title 11, U. S. C., Sec. 108.)

General Order No. 37 in Bankruptcy, as amended by the Supreme Court of the United States on January 16, 1939, provides, in proceedings under the Bankruptcy Act, the Rules of Civil Procedure shall, insofar as they are not inconsistent with the Act itself, or with General Orders in Bankruptcy, be followed.

Rule 13(b) of the Federal Rules of Civil Procedure provides:

> "A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject of the opposing party's claim."

Statement of the Case.

On January 21, 1955 petitioners filed their petition with Referee in Bankruptcy, David B. Head. The facts alleged therein were not controverted by answer, were not contradicted by countervailing evidence, are admitted by the respondent and are found as facts by the Referee. [Printed Transcript Record filed in the Court of Appeals, and on file herein, pp. 9-12.] Therefore, it concededly appears that during the year prior to bankruptcy, from December, 1953 to December, 1954, petitioners, in connection with their representation of the bankrupt corporation, expended of their own funds the sum of $3,217.68 for transportation, hotel accommodations, long distance calls, etc., all of which are itemized in Exhibit A to the petition, which is included in said printed transcript of record, pages 3 to 5. The petition alleged, and it is not denied, that during the time the petitioners represented the bankrupt, they never voted for fees, requested payment for services, or received any money as fees, and that the amount claimed does not represent any charge for services.

On or about December 20, 1954, "for the purpose of protecting its incoming funds and making certain essential disbursements therefrom, petitioners, Desser, Rau & Hoffman, acting as attorneys for the company and selecting one of their partners, Jack L. Rau, opened at the Union Bank & Trust Company of Los Angeles, a bank account designated as, 'Jack L. Rau, Special Account,' in which funds of the publishing company were deposited and out of which disbursements were made."

Thereafter, on December 31, 1954, an involuntary petition in bankruptcy was filed in the District Court against

the company. Promptly, on January 5, 1955, petitioners rendered an accounting of receipts and disbursements to respondent, George T. Goggin (then Receiver, later Trustee in Bankruptcy) showing the sum of $16,163.15 remaining in the Special Account, remitting the sum of $12,945.17 to the Receiver, retaining in the account the sum of $3,217.68, the amount of their out-of-pocket expense. On January 21, 1955 they filed their petition with the Referee setting forth the foregoing facts and praying that an order be entered authorizing them to reimburse themselves, out of the account, their cash advances made on the bankrupt's behalf in the sum of $3,217.68. The Referee issued an order to show cause why an order should not be entered granting the prayer of the petition.

Upon the return of the order to show cause, no sworn testimony or other evidence was introduced, the Referee concluding that from the face of the petition it appeared that petitioners were not entitled to set off, counterclaim or retain the amount requested in reimbursement for their cash expenditures. Permission to file briefs, however, was granted, and after the submission of written presentations of the respective positions of the parties, the Referee denied the prayer of the petition and ordered that petitioners, the firm of Desser, Rau & Hoffman, and Jack L. Rau, individually, pay to the Trustee in Bankruptcy the sum of $3,217.68, the amount held in the Special Account.

On January 11, 1956 the District Court affirmed the order of the Referee and approved and adopted his findings of fact and conclusions of law. It was from this

order of the District Court that the appeal to the court below was taken.[1]

The jurisdiction of the District Court for the Southern District of California, Central Division, is based upon Section 1334, Title 28, U. S. C. The jurisdiction of the Court of Appeals for the Ninth Circuit is based upon Sections 1291 and 1294, Title 28, U. S. C.

Reasons Relied Upon for Allowance of the Writ.

The amount here in controversy, true, is small but the principle involved is of extreme importance in the administration of estates in bankruptcy. The question presented has not been directly answered by any opinion of this Court and needs precise announcement for the guidance of lower courts when the same issue is presented in the future, as, from the nature of the problem, is bound again repeatedly to arise. Moreover, opinions of the various courts of appeal are not in such fundamental accord as to provide a uniform and determinative principle. The well considered cases (including a case decided by the Court below, *Half Moon Fruit & Produce Co. v. Floyd*, 60 F. 2d 799 (C. C. A. 9)), in analogous situations clearly indicate that the court below was wrong and that its decision in the instant case should be reversed.

---

[1]The Trustee in Bankruptcy made no contention touching the the subject of avoidable preference, nor did the Referee, in his findings of fact or conclusions of law, consider the subject. The Court of Apepals said that in the view it took of the law the question of voidable preference was not reached. It is believed, therefore, that these petitioners should not attempt to anticipate any question which may arise in the mind of this Court, leaving unbeclouded the issue presented by the decision of the Court of Appeals, which, it is respectfully suggested, is of such importance that it should finally be determined by this Court.

The court below held that the set-off of petitioners for cash advances could not be allowed because, (1) petitioners possessed no independent right to or lien upon funds in their hands which they held as agents of the bankrupt, and (2) because they had no attorneys' lien thereon under California law, and (3) because the allowance of the set-off would be inconsistent with the purposes of the trust. Petitioners' position is that the nature of their claim against the bankrupt and of their obligation to the bankrupt is not decisive against them; that the respective claims are mutual under Section 68(a) of the Bankruptcy Act; that they are not required to possess an independent right to, or lien against, funds in their hands, in order to claim a set-off; that they are not claiming by virtue of any lien, as attorneys or otherwise; and that the purposes of the trust have been terminated by bankruptcy, leaving only the obligation to repay the remaining unexpended balance to the Receiver or Trustee. Petitioners urge, also, that Rule 13 of the Federal Rules of Civil Procedure (made applicable to proceedings in bankruptcy under General Order No. 37 in Bankruptcy as amended by this Court), the judicial policy of the nation with respect to set-offs and counterclaims is announced and is to be considered in the decision of the instant case.

I.

The Claim of the Bankrupt and Its Trustee Against Petitioners for the Payment and Return of the Balance of the Funds in the Special Account and the Claim of Petitioners Against the Bankrupt and Its Trustee for Out-of-Pocket Expenditures of Cash by Petitioners on Bankrupt's Behalf, Present a Case of Mutual Debts and Mutual Credits Within the Meaning of Section 68(a) of the Bankruptcy Act.

It will be noted at the outset that the purpose of the Special Account was terminated by bankruptcy. Although it may be true that while the account was active and used for the purpose intended, petitioners could not elect to pay themselves, but after the termination of purpose and usability, all that remained to be done was to pay the balance to the bankrupt's Receiver or Trustee. This obligation was a simple one for the payment of a fixed and undisputed sum. Therefore, at the time of the bankruptcy petitioners owed and were obligated to pay the sum of $16,163.15. At the same time the bankrupt owed petitioners $3,217.68. The actual balance of money due from petitioners was $12,945.45 which was immediately paid. This balance represents the net and full obligation of the petitioners.

In its opinion the Court below conceded that there are some cases where an off-set has been allowed where fiduciary duties exist between the parties, but held that where the *res* is one in which the agent has no beneficial interest, the purposes of the trust are inconsistent with the allowance of mutual debts or credits as between the Trustee, as a trustee, and separate creditor of the beneficiary-debtor.

The Referee and the District Court decided that the fund was not held by petitioners' partner, Rau, "as his own" but as trustee or agent of the bankrupt which was the legal owner; and that, therefore, no mutuality of debts or credits was involved. [Printed Transcript of Record filed with the Court of Appeals, and on file herein, pp. 8 and 12.] The Court of Appeals did not go so far, holding that petitioners had no independent right to seize and hold any part of the fund, absent some independent right or lien. Actually, petitioners did not claim the right to withhold the fund or any part thereof as their own, or by virtue of any property interest or lien. They prayed to be allowed to set off the amount of their claim as against the claim of the bankrupt, which was admitted as owing to the bankrupt, and to pay the net balance.

There is an essential difference between a claim to a portion of the fund by way of title thereto or lien thereon and the fundamental theory of set-off. Attempting to distinguish the present case from its own decision in *Half Moon Fruit & Produce Co. v. Floyd*, 60 F. 2d 799, the Court of Appeals said that, absent bankruptcy, petitioners could not have asserted any lien against the money in the special account, evidently under the belief that the decision in the *Half Moon* case was based upon some kind of lien. Apparently the Court forgot that, in that case, the counterclaimant had forfeited and was held to have no lien. In the *Half Moon* case it appeared that a produce grower, shortly before bankruptcy, consigned melons to a commission merchant who had made *previous and independent advances* to the grower for which the bankrupt was indebted to the commission merchant. In reversing the order of the Referee, which was confirmed on other grounds by the District Judge, the Court below,

at page 801 of its opinion, made particular reference to "the broad significance given to the phrase 'mutual credits.'" The Court followed *Murray v. Riggs*, 15 Johns. (N. Y.) 571; 592, in which that court said that "mutual credit was not confined to pecuniary demands, *but extended to all cases where the creditor had goods in his hands of the debtor and which could not be got at without an action at law or bill in equity.*" (Emphasis supplied.)

In its opinion in the *Half Moon* case the Court below considered with approval the case of *Goodrich v. Dobson*, 30 Fed. Cas. No. 18279, page 1081, in which a manufacturer of cloth consigned goods to a New York merchant for sale. In approving that opinion the Court below said:

> "The property was sold after the bankruptcy and the amount derived therefrom applied upon an outstanding indebtedness owed by the manufacturer to the merchant."

The "broad significance" mentioned by the courts given to the phrase "mutual credit" is further exemplified by *In re W & A Bacon Co.*, 261 Fed. 109, 111 (D. C. Mass.). There the creditor had a claim for services for delivering parcels for the bankrupt store prior to bankruptcy. At the time of bankruptcy the creditor had a sum of money in its hands received as payments for goods delivered for the bankrupt to its customers.

In another decision by the Court below, *Fidelity & Deposit Co. of Maryland v. Duke*, 293 Fed. 661, 665 (C. C. A. 9) (a bank liquidation case) the court said:

> "Doubtless it will be conceded that set-off does not depend upon the variety of the contract or the character of the parties."

The Seventh Circuit, in *In re Field Heating & Ventilating Co.*, 201 F. 2d 316, said that whether the debts are mutual depends upon "whether each owes the other." The Court said also, at page 318:

> "We keep in mind that to justify set-off it is not necessary that the debts be of the same character; claims of different species may be set off if they are mutual."

Again, in *In re Rosenbaum Grain Co.*, 103 F. 2d 656 (C. C. A. 7), the Court approved the District Court's order allowing a set-off as between a grain broker and his customer. The court refused to make a distinction between such a situation and a stockbroker and his customers where the relationship was one of pledgee-pledgor.

The Eighth Circuit, in *First National Bank v. Malone*, 76 F. 2d 251, 254, said that a set-off is allowed "upon the theory that in good conscience one ought not to pay his creditor if he cannot ultimately compel his creditor to pay the debt due to him."

This Court, in *Studley v. Boylstone National Bank*, 229 U. S. 523, indicated a broad, realistic and equitable approach to the claim of the right of set-off, saying, "Such counterclaims can be asserted as a defense or as a voluntary act of the parties, because it is grounded upon the absurdity of making A pay B when B owes A."

The decision of this Court in *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, the single authority relied upon by the court below, is not in point. In that case there had been a long course of dealing between the Tie Company and Harrison, the bankrupt, in which the Tie Company's employees bought merchandise from Harrison who would make a record of such purchases and

forward it to the Tie Company which would deduct the amounts of the various employees' indebtednesses to Harrison from the pay due to them, and remit such sums to Harrison in full, regardless of how much Harrison might be indebted to the Tie Company at the time of the remittances. These deductions represented, not amounts owing to Harrison by the Tie Company, but by the latter's employees individually. Thus when the Tie Company determined to hold and keep amounts deducted from payrolls, and, credit such amounts to the indebtedness of Harrison, it was attempting to extinguish the liability of other persons to the bankrupt, and allow, as a credit, the amount thereof against the bankrupt's indebtedness to it. As this Court said, at page 507:

> "We think the findings establish that Harrison sold the goods, not to the Tie Company, but to the laborers, and, therefore, the result of the sale was to create an indebtedness for the price alone between Harrison and the employees."

This Court said, further, that the facts found established a course of dealing between Harrison and the Tie Company under which the Tie Company was under an obligation to remit the money collected from the laborers irrespective of any debt which he might owe the company. It was because of this established course of business that the Court held the Tie Company was not entitled to retain the proceeds of collections from its employees.

It is believed that the frequently and broadly asserted belief that a fiduciary may not set-off, in bankruptcy, an indebtedness to him of his principal, stems from unsupported textbook statements sometimes cited by the courts without analysis. For example, in 4 *Collier on Bankruptcy* (14th Ed.), 726, it is said that where the liability of one

claiming set-off, "arises from a fiduciary duty or is in the nature of a trust, the requisite mutuality of debts or credits does not exist, and such persons may not set off a debt owing from the bankrupt to such liability." But in the voluminous footnotes to the broad generality of the text it appears that some fiduciary duty was violated by the claimant, such as breach of duty by a corporate officer (*Putnam v. Handy*, 251 Mass. 196); or breach of duty by a corporate director, *Walker v. Man*, 253 N. Y. Supp. 472, or involved money fraudulently received by a controlling stockholder, *Lytle v. Andrews*, 34 F. 2d 252 (C. C. A. 8); or misapplication of the subject of the trust, *Morris v. Winsor Trust Co.*, 213 N. Y. 27, 106 N. E. 753.

In a further footnote, Collier goes on to say (p. 727, fn. 20) where a claimant against a bankrupt's estate is also indebted to the estate upon a debt arising from his possession of property belonging to the bankrupt, his duty to account to the bankruptcy trustee cannot be set off against the bankrupt's debt to him, "*if his possession was wrongful, but, if his possession was obtained with the bankrupt's consent, the debts are mutual and subject to set-off.*" The author cites *Bristol v. Killanna Corp.*, 85 F. 2d 667 (C. C. A. 2). So, also in *Levy v. Drew*, 4 Cal. 2d 456 (cited by Collier), the Court, adopting and quoting from one of its own prior opinions, said at page 460:

> "The rule is consistently applied in the Federal Court that where a debtor, prior to bankruptcy, voluntarily places in the hands of his creditor, assets for the particular purpose of extinguishing a debt, and bankruptcy occurs, the creditor can offset his demand against the claim of the trustee in bankruptcy for a return of the assets to the bankrupt estate."

The necessity for final definition of the expression "mutual debts or mutual credits" by this Court seems to be apparent.

II.

The Court Below Was in Error in Holding That Rule 13 of the Rules of Civil Procedure Has No Relevance to the Instant Situation.

The court below said that petitioners advanced the theory that Rule 13(a) of the Rules of Civil Procedure strengthened their position under Section 68(a) of the Bankruptcy Act, and said that it could not agree that this procedural rule would grant a substantial substantive right which did not otherwise exist.

Petitioners urged upon the court below that the Federal Rules of Civil Procedure furnish additional support for petitioners' contentions as to the propriety of the allowance of their set-off or counterclaim against the demand of the Trustee for the payment of the balance of funds in the special account, because bankruptcy courts proceed, whenever possible, under Federal Rules of Civil Procedure which now specifically authorize set-offs and counterclaims, even where not arising out of the same transaction and even where the respective claims are completely different in nature and in substance and in the form of the remedy.

Section 68(a) of the Bankruptcy Act is itself essentially procedural, providing as it does that where claims against and claims of a bankrupt are "mutual" they may be set off and the actual balance only paid. Under Rule 13 all semblance of older technical requirements, all of the rules and dicta respecting the nature or special character of the indebtedness or indebtedness as to which there are claims and counterclaims, are swept away in the

interest of substantial, quick and economical justice. Rule 13a provides that a pleading *must* state as a counterclaim any claim which arises out of a transaction or occurrence. Under subdivision (b), the provision here applicable, it is provided, "a pleading may state as a counterclaim *any claim* against an opposing party *not arising out of the transaction or occurrence* that is the subject matter of the opposing party's claim. "The legislative history of Rule 13 reveals an almost limitless breadth of liberality."[2]

Under General Order No. 37 in Bankruptcy, as amended by this Court on January 16, 1939, it is provided that, in proceedings under the Bankruptcy Act, the Rules of Civil Procedure, shall, insofar as they are not inconsistent with the Act itself or with General Orders in Bankruptcy, be followed.

It is believed that Rule 13 of the Federal Rules of Civil Procedure has the effect of still further broadening the already liberal interpretation given by the courts to Section 68(a) of the Bankruptcy Act. Being a definite expression of nationwide judicial policy in the matter of the recoverability by way of set-off of an admitted claim, it is believed that the court should take the rules into consideration in situations such as is involved in the case at bar.

The liability of petitioners, at the time of bankruptcy, was to pay a liquidated sum of money. At the same time the bankrupt owed petitioners a fixed sum for cash ad-

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[2]Interesting discussions as to the wide scope and purpose of Rule 13 appear in "Proceedings of American Bar Association Institute" held in Cleveland, page 247; Moore's Federal Practice, Vol. 1, page 645; Notes of the Advisory Committee on Rules, Title 28, U. S. C. A., page 514, and 25 Virginia Law Review 261.

vances. Petitioners' real indebtedness at that point in time was the actual net difference between these two obligations. It would seem that both Section 68(a) of the Bankruptcy Act and Rule 13 of the Federal Rules of Civil Procedure are designed to accomplish this end result.

Wherefore petitioners respectfully pray that this petition for Writ of Certiorari to review judgment of the Court of Appeals for the Ninth Circuit be granted.

JACK L. RAU,
Attorney for Petitioners.

THEODORE E. REIN,
Of Counsel.

APPENDIX.

United States Court of Appeals for the Ninth Circuit.

Desser, Rau & Hoffman and Jack L. Rau, Individually, Appellants, vs. George T. Goggin, Trustee in Bankruptcy of Stockholders Publishing Company, Inc., a bankrupt, Appellee. No. 15,073. Jan. 8, 1957.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: ORR, LEMMON and CHAMBERS, Circuit Judges.

CHAMBERS, Circuit Judge:

Before its demise the Daily News of Los Angeles was published by the now bankrupt Stockholders Publishing Company, Inc. During the period December 1, 1953, to December 31, 1954, the company was represented by the Los Angeles law partners, Desser, Rau & Hoffman.

On December 31, 1954, a petition in involuntary bankruptcy was filed against the company. Subsequently an adjudication of bankruptcy was made. The lawyers were not only not paid for their services, which must have been extensive, but they are out of pocket moneys in the amount of $3,217.68 expended for stockholders on travel about these United States and for telephone toll charges paid. The accuracy of the balance has never been questioned.

On January 5, 1955, Desser, Rau & Hoffman reported to Goggin, then receiver and now trustee, that they held a balance of $16,163.15 belonging to Stockholders in a separate account established on December 20, 1954, in the Union Bank & Trust Co. of Los Angeles under the name of "Jack L. Rau, Special Account." Rau, of course, was one of the partners. Shortly after January 5, Rau re-

mitted the undisputed amount of $12,945.47 to the receiver. The balance then left $3,217.68, an amount exactly equivalent to Desser, Rau & Hoffman's out of pocket expenditures. Presumably the balance is still in the account. As to this sum, the lawyer partners claim a right of setoff. To this the receiver did not and does not accede.

Accordingly, on January 21, 1955, the lawyers filed a petition to establish the setoff before the referee who had the affairs of Stockholders for supervision. A hearing was held and the matter briefed by respective counsel. The referee held that Rau "held the moneys in the account as trustee or agent of the bankrupt and that the account was the property of the bankrupt." The setoff was disallowed and Rau was ordered to pay the balance of the money over to the referee. Review was had before the district court which sustained the referee. The order of the court now comes to this court on appeal.

It should be related that on December 18, 1954, Stockholders was in serious financial trouble and had authorized its attorneys (Desser among those attending the meeting) to file a petition for voluntary bankruptcy of the company. It also appears that the scheme for the account in Rau's name was arranged at the same meeting. The purpose of the account seems to have been to set aside funds for the immediate needs of the company in a temporary haven of refuge in the name of an agent with his principal undisclosed. No one has suggested that any aspects of the plan were less than honorable.

It appears that any amount expended by Desser, Rau and Hoffman after December 20, 1954, was almost *de minimis*. In other words most of the debt for moneys expended by the lawyers antedated the establishment of the Rau account. In the view this court takes of the law

applicable, the question of voidable preference is not reached, although it is argued in the briefs.

At the outset, this court is of the opinion that the case should be decided the same as it would be if the account had stood in the name of "Desser, Rau & Hoffman, special account." Rau had no real connections with the business of the Stockholders company other than his firm's business. We think what he was doing was in truth an act and conduct of the firm.

Thus we come to the application of Sec. 68(a) of the Bankruptcy Act, 11 U. S. C. A. §108(a), which reads as follows:

> "In all cases of mutual debts or mutual credits between the estate of the bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

It is our construction, after considering the decisions, that the lawyer partners are not entitled to setoff.

Here the firm and Rau had no duties with respect to the account but to disburse them as directed. They had no beneficial interest whatsoever in the account. It is true that there are some cases where perhaps some fiduciary duties exist between the parties and an offset has been allowed. But we are of the opinion that where the *res* is one in which the agent has no beneficial interest, nothing more than a desire now to be paid out of the *res*, that the purposes of a trust are inconsistent with the allowance of mutual debts or credits as between the trustee as a trustee and separate creditor of the beneficiary-debtor. At least that is the way we read Western Tie & Timber Co. v. Brown, 196 U. S. 502. While it is not a new case, its authority does not seem impaired.

While we think it unnecessary to ground our decision on the proposition, we think the California law on attorneys' liens affords a second block to the appellants. As we understand the California law, absent any bankruptcy, the law firm could not have asserted any lien against the money in the Rau account. (There obviously was no agreement for a lien.) See 6 Cal. Jur. 2d 410, *et seq.*, *Ex Parte* Kyle, 1 Cal. 331, Jones v. Martin, 41 Cal. 2d 23, 256 P. 2d 905. This proscription alone by California of the lien would distinguish our case of Half Moon Fruit and Produce Co. v. Floyd, 9 Cir., 60 F. 2d 799.

It is not our problem to here catalogue the cases where setoff is allowed. But we do think that where it is allowed against property in the creditor's hands the creditor must already have some beneficial interest of his own in or against the subject property, at least an equitable lien.

The partners rely on *In Re* W. & A. Bacon, D. C. Mass., 261 F. 109. There offset of a creditor's balance for services due from debtor was allowed against moneys collected by the creditor on C. O. D. deliveries for the account of the debtor. There the court found that the debtor long had acquiesced in the commingling of collections with the creditors' own funds and that there was no trust. And it seems clear enough that in Half Moon Fruit & Produce Co. v. Floyd, *supra*, the bankrupt's creditor had at least a qualified property right in the *res* in his hands.

Appellants advance the theory that Rule 13a, Rules of Civil Procedure, strengthens their position under Section 68(a) of the Bankruptcy Act. We cannot agree that this procedural rule would grant a substantial substantive right which did not otherwise exist.

We are convinced in the type of case of which this is one, where no right of setoff or any other right against the fund existed before bankruptcy that one cannot now establish the setoff.

Maybe as a matter of legislative policy a scrupulous faithful trustee should have as much right of offset for a collateral debt as those who commingled (with the consent of the rightful owners) in Bacon, *supra*, but our judgment is that we are not at liberty to give it.

The final order of the district court is affirmed.

(Endorsed:) Opinion. Filed Jan. 8, 1957.

Paul P. O'Brien, Clerk.

IN THE

Supreme Court of the United States

October Term, 1956

No. 988

ESSER, RAU & HOFFMAN and JACK L. RAU, individually,

Petitioners,

vs.

GEORGE T. GOUGIN, Trustee in Bankruptcy of Stockholders Publishing Company, Inc., a bankrupt,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER.

JACK L. RAU,

444 North Camden Drive,

Beverly Hills, California,

Attorney for Petitioners.

THEODORE E. REIN,

Chicago, Illinois,

Of Counsel.

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IN THE

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GEORGE T. GOGGIN, Trustee in Bankruptcy of Stockholders Publishing Company, Inc., a bankrupt,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER.

The brief filed on behalf of Respondent does not meet or substantially answer the position of Petitioners on their application for the Writ of Certiorari. There are, however, a few assertions and contention in Respondent's brief which need reply and correction.

In Respondent's statement of the question presented for review (Resp. Br. p. 1) he includes, in speaking of the firm of attorneys who seek to set-off a claim for out-of-pocket expenditures, the statement that one of such firm "is an officer and director of the corporation." The inclusion of this language in Respondent's framing of the

question presented is, for the obvious purpose of laying a foundation for that portion of Respondent's argument devoted to the irrelevant proposition that a director of an insolvent corporation is a trustee for creditors, as well as for the corporation, and will not be allowed "to use his position, with superior knowledge or opportunity of acquiring information which it affords, to secure an advantage for himself over other creditors." (Resp. Br. p. 6.) All of this, of course, has nothing to do with the case at bar. Petitioners are not seeking, and have never sought, to take any advantage or to avail themselves of any knowledge which came to one of the members of the petitioning firm as a director of the bankrupt. They did not deduct or attempt to deduct the amount of their claim, even though they knew that the publishing company was unable to meet its obligations. Had they done so, then, and only then, would they have come within the rule upon which Respondent bases his contention. On the contrary, they waited until after bankruptcy and then presented a petition for leave to set off their claim as against the amount owing to their erstwhile client, like any other outside party possessing no forewarning or information.

Respondent contends, hypothetically (Resp. Br. p. 6), that "*if* petitioners had made any payments to themselves from the special account, it would have been a breach of fiduciary duty." This argument is an idle one because petitioners did not assume to make any such payment. It is similarly futile to contend that *if* such a payment had been made, *it would have been* voidable as an unlawful preference.

The sharp question before the courts below and before this Court is whether or not the respective and admitted claims present a case of mutual debts or mutual credits under Section 68(a) of the Bankruptcy Act.

Respondent contends that the Court of Appeals successfully distinguished the present case from *Half Moon Fruit & Products Co. v. Floyd*, 60 F. 2d 709, upon the ground that Petitioners "could not have asserted any lien against the money in the trust account," and upon the ground that "the law firm had no beneficial interest in the trust account." In the first place, Petitioners do not seek to assert a lien nor do they predicate their claim upon the existence of a lien. In the second place, as pointed out in the Petition for the Writ at page 9, the Court of Appeals failed to note that the counterclaimant in the *Half Moon* case had forfeited his lien and was, therefore, held to have no claim on such basis. Furthermore, the Court of Appeals did not place its attempted distinction on the ground that petitioners had no beneficial interest in the trust account, although the opinion does state that the commission merchant in the *Half Moon* case had some kind of "a qualified property right in the res," whatever this means. If petitioners had possessed a lien, or beneficial interest or property right in the fund, they would not present or be obliged to present their claim by way of set off, which is based upon an independent or separate obligation and which concedes the existence of the claim of the other party.

It is believed that the court in *Western Fuel and Timber Co. v. Brown*, 196 U. S. 502, did not ground its opinion

upon the fact that the Tie Company was in the position of a trustee, as is contended by Respondent. (Resp. Br. p. 5.). Ratner, the court predicated its opinion upon the fact that the established course of dealing between Harrison, the bankrupt, and the Tie Company, was that the Tie Company invariably remitted in full money collected from its employees which they owed to Harrison without regard to any indebtedness of Harrison to the Tie Company. Moreover, the court said that the findings established "that Harrison sold the goods, not to the Tie Company, but to the laborers, and, therefore, the result of the sale was to create an indebtedness for the price *alone* between Harrison and the employees." (Italics supplied.)

Respondent has completely failed to recognize or to explain away the decisions called to this Court's attention in the petition herein (pp. 9-13), contenting himself, doubtless, with the inadequate treatment of the subject by the Court below in the language, "It is not our problem to here catalogue the cases where setoff is allowed," because "where it is allowed * * * the creditor must already have some beneficial interest of his own in or against the subject property * * *." If this the Court was in error. The authorities do not justify such conclusion.

Neither does the Respondent discuss the effect of Rule 13 of the Rules of Civil Procedure, again probably relying upon the assertion by the Court of Appeals that "this procedural rule would (not) grant a substantive right which did not otherwise exist." Petitioners' basic substantive right was a valid claim to reimbursement for out-

of-pocket expenditures, and the right of set-off in bankruptcy as against funds properly in claimants' hands was a procedural opportunity already afforded by Section 68(a) of the Bankruptcy Act.

If a graph of the decisions were drawn it is believed that it would show a rising tendency to allow set-offs and counterclaims in situations such as is presented in the instant case.

Again it is urged that the petition for the Writ of Certiorari be allowed.

Respectfully submitted,

JACK L. RAU,

Attorney for Petitioners.

THEODORE E. REIN,

Of Counsel.

Office - Supreme Court, U.S.
FILED
JUL 3 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. ~~988~~ 120

DESSER, RAU & HOFFMAN and JACK L. RAU, individually,

Petitioners,

vs.

GEORGE T. GOGGIN, Trustee in Bankrupty of Stockholders Publishing Company, Inc., a bankrupt,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

ROBERT H. SHUTAN,
433 South Beverly Drive,
Beverly Hills, California,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

October Term, 1956.
No. 988.

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Question Presented for Review.

Where, in contemplation of bankruptcy, and in order to insure the ability to make essential priority disbursements, a corporation deposits its funds in a special trust account in the name of one of the members of the law firm which represents the corporation, may such firm of attorneys, one of whom is an officer and director of the corporation, after bankruptcy be permitted, upon a theory of set-off as defined in Section 68(a) of the Bankruptcy Act, to reimburse itself from said trust account for costs and expenses advanced on behalf of said corporation during the year preceding the opening of said trust account?

Statement of the Case.

A full perception of this case suggests the advisability of adding briefly to the Statement of the Case as presented by petitioners in their Petition herein. Not only was the subject special bank account opened on December 20, 1954, for the purpose of the protection of the incoming funds of the corporation and the making of certain essential disbursements therefrom, but two days previously, on December 18, 1954, the entire Board of Directors of the corporation, one of which directors was Arthur Desser, one of the petitioners, met to discuss the serious financial difficulty of the corporation and at that time authorize the filing of a Voluntary Petition in Bankruptcy on behalf of the corporation. On December 31, 1954, creditors filed an Involuntary Petition in Bankruptcy against the corporation. On January 5th, these petitioners remitted to the Receiver in bankruptcy all of the funds in said special account except the $3217.68. On January 21, 1955, petitioners filed with the Referee a Petition for an Order authorizing them "to reimburse themselves" out of the funds of the corporation in the special bank account, the sum of $3217.68 for moneys advanced in the year prior to December 18, 1954.

The Referee denied the Petition, holding that the funds in the special account constituted property of the bankrupt corporation, that Rau held only as Trustee or agent of the bankrupt corporation, and that there was no mutuality of debts or credits between the funds held by petitioners and the obligation of the bankrupt corporation for the funds advanced by petitioners.

As stated, the District Court affirmed the order of the Referee and approved and adopted his findings and conclusions. The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court.

Argument.

There is no adequate reason for the Supreme Court of the United States to grant the Writ requested.

The primary issue involves a determination of whether the factual situation herein gives petitioners a right of "set-off" within the meaning of Section 68(a) of the Bankruptcy Act, to funds of the bankrupt in the special trust account in the care of petitioners.

The trial court (*i. e.*, the Referee) ruled that this factual situation was not within the purview of Section 68(a)—that the subject funds were always the property of the bankrupt. The District Court, on review, affirmed on the same grounds. The Court of Appeals affirmed, pointing out that no right of set-off or any other right against the fund existed before bankruptcy and that clearly such a right could not be then established *after* bankruptcy.

It is submitted by respondent that petitioners do not set forth an adequate reason upon which this Court should base an allowance of the requested Writ. Petitioners assert that lower Courts need the "precise announcement" of this Court for guidance in future matters. Petitioners further assert that the "opinions of the various Courts of Appeal are not in such fundamental accord" on the subject matter of this case, and thereby imply a conflict in the Circuits. Thirdly, petitioners state that the instant case should be reversed because the opinion of the Court of Appeals for the Ninth Circuit was wrong. For the latter contention petitioners rely upon the case of *Half Moon Fruit & Produce Co. v. Floyd*, 60 F. 2d 709, a 1932 decision of the Court of Appeals for the Ninth Circuit. In its opinion in the instant case the Court of Appeals fully discussed its earlier decision in the *Half Moon Fruit* case

Produce case and clearly and easily distinguished it from the facts of the present case.

In their effort to invoke the interest and action of this Court petitioners in their brief cite cases from several Circuits dealing with questions of mutual debts and credits and set-off under Section 68(a) of the Bankruptcy Act. There are, of course, a multitude of cases dealing with the subject matter at hand. However, petitioners have completely failed to show that the opinion of the Court of Appeals in the instant case is in any material conflict with decisions of the Courts of Appeal of other Circuits.

As pointed out above, the chief case relied upon by petitioners in their opposition to the present ruling, is an earlier case in the same Ninth Circuit (*Half Moon Fruit & Produce Co. v. Floyd*, 60 F. 2d 799). In the *Half Moon* case, a commission merchant who had made seasonal cash advances to a grower to enable him to produce his crop was held to be entitled to an equitable lien on mellons consigned to him by the grower, and entitled to a "mutual credit" in the "set-off" sense for such advances against the proceeds from the sale of the mellons. The opinion of the Court of Appeals in the instant case distinguishes the *Half Moon* case, on at least two clear-cut grounds, and points out that in the absence of bankruptcy the petitioner law firm could not have asserted any lien against the money in the trust account, and further that the law firm had no beneficial interest in the trust account. The Court of Appeals rejected the theory of the petitioners that the occurrence of bankruptcy changed the nature of the fund and created a right to a set-off which had not previously existed.

There is, therefore, no such conflict on the subject point of law among the various Courts of Appeal that requires

the attention and action of the United States Supreme Court. While the subject matter of the instant case does involve a question of law under the Federal Bankruptcy Act, the question is not novel or unusually significant, and the Courts have thoroughly dealt with it. This Court itself has previously dealt directly with the subject matter of the instant case in the matter of *Western Tie and Timber Co. v. Brown*, 196 U. S. 502, 49 L. Ed. 571. In the latter case, the tie company and Harrison, the bankrupt, had been engaged in removing timber from the tie company's land, etc. The bankrupt operated stores, patronized by laborers of the tie company. The tie company deducted from the payroll the amount owed by the laborers to the bankrupt for purchases. Against a $24,000.00 debt owed to it by the bankrupt the tie company attempted to set off $2,210.73 collected from payrolls and held for the bankrupt. This Court held that the creditor could not set this off. The creditor was in a position of a trustee and therefore the case was not one of mutual credits and debts within the meaning of the set-off clause of the Bankruptcy Act. The authority of the *Western Tie and Timber Company* case has been respected and followed since it was handed down, and the Court of Appeals in the instant case recognized and specifically followed this authority.

Petitioners in their Petition herein (p. 13) seek to disengage themselves from the proposition that where the liability of one claiming a set-off arises from a fiduciary duty or is in the nature of a trust, the requisite mutuality of debts or credits does not exist, and such person may not set off a debt owing from the bankrupt to such liability. The petitioners assert (Pet. p. 7), but nowhere cite authority therefor, that their position is that upon the occur-

rence of the bankruptcy, the trust ceased and they merely had an "obligation to repay the remaining unexpended balance to the Receiver or Trustee." This proposition was answered in the Court below and the authorities have been referred to hereinabove. However, respondent desires to add one further thought on this point. Petitioners were not only fiduciaries by virtue of being trustees (through Rau) of the special bank account, but were fiduciaries also by virtue of Desser being an officer and director and attorney for the bankrupt corporation. The Board of Directors (including Desser) of the bankrupt corporation had recognized the hopeless insolvency of the corporation and had authorized the filing of a Voluntary Bankruptcy, even before the subject special bank account was opened.

A director of an insolvent corporation is a trustee for the creditors as well as for the corporation, and will not be allowed to use the trust property for his own benefit to the disadvantage of other creditors, nor will he be allowed to use his position with the superior knowledge or opportunity of acquiring information which it affords, to secure an advantage for himself over other creditors.

19 Corpus Juris Secundum 1108;

Hanson v. Choynski, 180 Cal. 275;

Nixon v. Goodwin, 3 Cal. App. 358.

If the partners (petitioners herein) had made any payments to themselves from the special account on account of the bankrupt's indebtedness to them, this would have been a breach of fiduciary duty to the bankrupt corporation and its creditors. It would have been a payment voidable under the California law pertaining to duties of corporate directors and officers, as well as being voidable under Section 60 of the Bankruptcy Act as a recoverable

preference. No such payment, of course, was made. At the time of bankruptcy, and now, the funds remained in the corporation's special account. Petitioners have been seeking to receive such a payment *after bankruptcy and by order of the bankruptcy court itself!* The Court of Appeals and the District Court have both held that the Referee was correct in refusing to permit and authorize such a payment to petitioners.

Conclusion.

Petitioners have failed to state an adequate reason for allowance of the Writ. For the reasons set forth hereinabove, the Petition for Writ of Certiorari should be denied.

ROBERT H. SHUTAN,
Counsel for Respondent.